71 151 (10) 24

No. 06-1287

FILED
OCT 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION of the State of Georgia; Bart L. Graham, as Commissioner of Revenue of the State of Georgia; Russell W. Hinton, as State Auditor of the State of Georgia; and Gena L. Abraham, as Director of the Georgia State Properties Commission,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

ELLEN M. FITZSIMMONS
DAVID J. BOWLING
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 359-3200

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ILEANA M. CIOBANU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-8124

JAMES W. MCBRIDE
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
555 Eleventh Street, NW
(202) 508-3400

Counsel for Petitioner

* Counsel of Record

October 22, 2007

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Burlington N. R.R. v. *Okla. Tax Comm'n*, 481 U.S. 454 (1987) ..... *passim*
Cmty. for Creative Non-Violence v. *Reid*, 490 U.S. 730 (1989) 1
Dep't of Revenue of Or. v. *ACF Indus., Inc.*, 510 U.S. 332 (1994) 2, 10, 12, 13
FMC Corp. v. *Holliday*, 498 U.S. 52 (1990) 2
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 1
Kelly v. *Robinson*, 479 U.S. 36 (1986) 16
McCaughn v. *Hershey Chocolate Co.*, 283 U.S. 488 (1931) 16
Nat'l Private Truck Council, Inc. v. *Okla. Tax Comm'n*, 515 U.S. 582 (1995) 12
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 1
Powerex Corp. v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411 (2007) 12
Salinas v. *United States*, 522 U.S. 52 (1997) 1, 2, 12
State R.R. Tax Cases, 92 U.S. 575 (1875) 4
Suitum v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) 8
United States v. *Miller*, 317 U.S. 369 (1943) 2

STATUTES

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 7
28 U.S.C. § 1341 12
28 U.S.C. § 1983 12
49 U.S.C. § 10102(1) 4
§ 11501 ..... *passim*
Ala. Code § 40-21-6 19
Ark. Code Ann. § 26-26-1607 19
Colo. Rev. Stat. §39-4-102 19
Fla. Stat. § 193.011 19

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY Page

Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 91st Cong. (1970) 17

State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce, 91st Cong. (1969) 17

Tax Assessments on Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 88th Cong. (1964) 14, 17

S. Rep. No. 87-445 (1961) 5, 15

SCHOLARLY AUTHORITY

2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* (7th ed. 2007) 16

OTHER AUTHORITY

Appraisal Inst., *The Appraisal of Real Estate* (12th ed. 2001) 2

REPLY BRIEF

Respondents advance a fundamentally flawed approach to statutory construction. "The starting point for [the] interpretation of a statute is always its language," *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989), and courts must "look to the provisions of the whole law, and to its object and policy," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotation marks omitted). Yet respondents discount the text, surrounding provisions, and policy of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act"), 49 U.S.C. § 11501, and instead begin with federalism canons. See Resp. Br. 9-18. This misguided approach leads respondents directly to an incorrect interpretation of the 4-R Act.

The "clear-statement" canon of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), may be invoked only when the statutory text is ambiguous and "susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers." *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997). The canon is not a license to rewrite a federal statute to advance state interests that Congress plainly decided must yield to an overriding federal interest. Section 11501 vests the district court with the power to determine the factual question of a railroad's "true market value." Absolutely nothing in the statutory text limits the district court to applying the State's preferred methodologies or restricts the evidence of market value that the court may consider in resolving that factual question. Respondents propose nothing more than to rewrite § 11501(b)(1) in a way that eviscerates the federal discrimination remedy and defeats Congress's purpose. This Court should reject respondents' approach and give the statute its plain meaning.

1. Subsection (b)(1) outlaws various forms of state and local tax discrimination against railroads, including "[a]ssess[ing] rail transportation property at a value that has a higher ratio to the true market value of the rail transportation

property" than the comparable ratio for other commercial and industrial property. 49 U.S.C. § 11501(b)(1). Subsection (b)(1) thus defines "in no uncertain terms" a "precise" federal discrimination standard based on comparison of assessed-to-market value ratios. *Dep't of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994). Accordingly, a district court resolving a (b)(1) discrimination claim must "determine what the 'true market values' are." *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987). The plain meaning of "*the true* market value" of rail transportation property is the *single* value that the district court finds, based on the evidence, best approximates the most probable cash price at which a willing buyer and a willing seller would agree to exchange the property in a competitive market. Petr. Br. 7, 24; Appraisal Inst., *The Appraisal of Real Estate* 22 (12th ed. 2001); *United States* v. *Miller*, 317 U.S. 369, 374 (1943). That single "true market value" becomes the denominator in the ratio used to determine whether the State has imposed a discriminatory tax in violation of subsection (b)(1).

It is axiomatic that undefined statutory terms are to be given their "ordinary meaning." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990). Respondents offer no contrary "plausible interpretation[]," *Salinas*, 522 U.S. at 59, of the statutory phrase "the true market value" of rail transportation property. Instead, they ask this Court to import restrictive terms into the statute to limit the district court to finding "the true market value of [rail transportation] assets determined under a correctly applied, reasonable valuation method chosen by the state." Resp. Br. 8, 18. That is exactly the kind of interpretive rewriting of the statute that this Court flatly rejected in *Oklahoma Tax*. There, the respondent state authorities and the court of appeals, in the name of federalism, had respectively construed this statutory phrase to mean "'state determined market value'" or state-determined market value absent proof of intent to discriminate. 481 U.S. at 461-63. This Court rejected those constructions out of hand as "depend[ing] upon the addition of words to a statutory provision

which is complete as it stands. Adoption of [such a] view would require amendment rather than construction of the statute, and it must be rejected here." *Id.* at 463. Respondents' proposed construction fails for the same reason.

2. Furthermore, respondents' rule cannot be reconciled with the statutory requirement that the district court determine "the *true* market value" of rail transportation property, for it would in many instances force the district court to accept a value that in its judgment was patently wrong, so long as the value was calculated by "a correctly applied, reasonable valuation method chosen by the state." Resp. Br. 8, 18. Respondents have abandoned any defense of the Eleventh Circuit's categorical exclusionary rule, in which the district court would have to accept "all nonfactual determinations . . . [of the state appraiser] in constructing a valuation process, regardless of how broad or narrow they may be," JA 259-60, but they never explicate the "reasonable valuation method" standard they have fashioned out of whole cloth. They merely imply that any methods that have been approved by courts at any time in the past are necessarily "appropriate" and "reasonable." Resp. Br. 22, 28.

For example, respondents suggest that because this Court "accepted" the stock-and-debt approach in certain nineteenth-century cases, a district court must use that approach in determining "true market value" if the State relied upon it. *Id.* at 22-23 (citing *State R.R. Tax Cases*, 92 U.S. 575, 605 (1875)). However, the stock-and-debt approach is generally regarded as an unreliable means of calculating property value (and is generally used only as benchmark for testing valuations generated by more reliable techniques). Petr. Br. 10, 32. The stock-and-debt method is particularly unlikely to yield an accurate value in the (b)(1) context, where the property to be valued is not that of the entire publicly traded railroad corporation, but only of "rail transportation property," 49 U.S.C. § 11501(b)(1), which is limited to "property . . . owned or used by a rail carrier providing transportation subject to the

jurisdiction of the [Surface Transportation] Board." *Id.* §§ 11501(a)(3), 10102(1). A number of railroad corporations (like CSXT) are subsidiaries of publicly traded corporations that conduct other lines of business, and thus any computation of "the true market value of rail transportation property" by sole reliance on the stock and debt prices of the parent corporation is likely to be inaccurate, and certainly the choice of that method should not be conclusive as a matter of law.[1]

Indeed, here the stock-and-debt approach yielded a unit value of $12.022 billion, 47% higher than even the inflated figure that Georgia's own appraiser claimed was CSXT's actual unit value. Pet. App. 4a. Nonetheless, under respondents' construction, if the State had chosen that method and "correctly applied" it (*i.e.*, made no computational errors), the district court would be bound to accept that figure as the "true market value" and to use it in applying the subsection (b)(1) discrimination standard—even if the district court were wholly convinced by other evidence or if inherent flaws or biases in this methodology caused the calculated value not to remotely reflect "the true market value" of the rail transporta-

---

[1] Respondents' reliance on the *State Railroad Tax Cases* is particularly ironic, given that the issue there was the constitutionality, as applied to a railroad corporation, of a tax on all the capital and franchises of any corporation doing business in the State. 92 U.S. 575, 602-03 (1875). This Court stated that "all [the railroad's] property, its capital stock, and its franchises" were "represented by the value of its bonded debt and of the shares of its capital stock." *Id.* at 605. That decision says nothing about whether the stock-and-debt method would be appropriate to value "rail transportation property" under the limited definition of that term in the 4-R Act. Moreover, in the *State Railroad Cases*, this Court cogently analyzed the shortcomings of the stock-and-debt method, even while declining to find it unconstitutional as employed in the state statute at issue. It recognized that, while the value of a corporation's bonded debt and shares theoretically should reflect the value of its property, in the real world this calculation might not reflect the actual value of the railroad's property. *See id.* at 605. For instance, a railroad with a stock and debt value of zero could still possess real property with a value that could be taxed. *See id.* at 605-06.

tion property. The statute cannot bear the meaning respondents would give it.

Respondents' "reasonable valuation method" standard would similarly force district courts to use replacement cost methods, if chosen by the State. Replacement cost methods were accepted by courts in the past, but nevertheless have long been recognized as an inaccurate measure of value because the difficulty of calculating all forms of depreciation and economic obsolescence makes it a poor fit for modern railroads. See S. Rep. No. 87-445, at 456-57 (1961). As the Solicitor General observes, a major purpose of section 11501 was to allow federal court scrutiny of these and similar outmoded procedures that systematically inflated rail transportation property valuations and resulted in discriminatory taxation, and it would make little sense to say that courts are powerless to redress "the cause of the problem Congress sought to remedy." U.S. Br. 16-17; see also Petr. Br. 36-37. Yet here too, under respondents' rule, the district court would have to accept replacement cost value as "the true market value" even if the court concluded that this method were biased and yielded falsely inflated values.

Respondents' proposed standard is not simply atextual; it is unfaithful to the clear intent expressed in the text. And to so hold, this Court need not decide whether either the stock-and-debt approach or the replacement cost approach is deficient. Rather, this Court need only decide that railroads should *not* be categorically precluded from arguing, and federal courts should *not* be categorically precluded from finding, that those methods do not yield the best evidence of value in any particular case.

The 4-R Act is a sweeping antidiscrimination statute enacted to cure years of systematic, financially damaging state tax discrimination against railroads, which was often accomplished by use of discriminatory valuation methodologies. Petr. Br. 35-39; U.S. Br. 9, 16-17; S. Rep. No. 87-445, at 451 ("outdated procedures" for assessing property "are sometimes

deliberately retained"). Under respondents' test, a state authority would be free to employ discriminatory methods that inflate the valuation of a particular railroad in a given year, so long as the method was not unreasonable in some undefined sense. Indeed, insulating the selection of methodology from judicial scrutiny merely invites state appraisers to practice discrimination by that means. Petr. Br. 36-37; AAR Br. 15. Congress did not enact a self-defeating statute. The experiences of CSXT and other railroads in Georgia are a mere foretaste of the gaping enforcement loophole that adoption of either the Eleventh Circuit's, or respondents', rule would open. Petr. Br. 37-38 & n.12; AAR Br. 19 & n.13.

3. Congress could have chosen to create a federal administrative review remedy in which deference was paid to the state authorities' valuation decisions, but it logically chose not to do so, U.S. Br. 10, because requiring deference to the state appraisers' valuation methods would have neutered the statute, AAR Br. 14-16; Petr. Br. 30-33. Instead, subsection (b)(1) clearly mandates that the district court make an independent determination of the fact of "the true market value of the rail transportation property." Thus, in a subsection (b)(1) case, the district court's finding of discrimination does not turn upon whether the State's methodology is unreasonable, arbitrary, or animated by discriminatory purpose. Moreover, the district court does not examine whether States use the same or different valuation methods for railroad and commercial and industrial property. And even if the district court finds a violation, it does not enjoin the State from using any particular valuation method or technique in future valuations and assessments. Instead, subsection (b)(1) creates a *de novo* federal remedy whereby discrimination is proven according to a statutory formula. It is an outcome-based discrimination test that depends upon a comparison between the assessed-to-market value ratios for rail transportation property and other commercial and industrial property. AAR Br. 21. If the rail transportation property ratio is more than 5% higher than the counterpart for other commercial and industrial property, the

court may order injunctive relief, but "only to the extent of any portion based on excessive values." Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (1976).

"[*T*]*he true* market value of the rail transportation property" is one of the critical questions of fact that the district court must determine in applying the federal standard. Under a natural reading of the statute, railroads should be able to put on evidence regarding the true market value of its rail transportation property, using any valuation methodology supported by reliable expert testimony. There is nothing in subsection (b)(1) that justifies the arbitrary exclusionary rule crafted by the Eleventh Circuit (which respondents do not defend), nor the modified version of it advanced by respondents. Congress did not make "true market value" an element of a (b)(1) discrimination claim, and then deprive the railroads of their ability to prove it.

4. Even aside from the impermissibility of adding words to the statute, respondents' construction is based on the false premise that "the true market value" of a property is derived by plugging data into a particular methodology. Resp. Br. 8, 18. That is not how professional appraisers (including state tax appraisers) actually value property; it is not even how Georgia's own appraiser proceeded in this case.

Professional appraisers do not find the "value" of property by recourse to a single valuation methodology. Different methods provide different "evidences" of market value, and appraisers routinely use several different methods to help ascertain the "true market value" of a property. Petr. Br. 6-12; U.S. Br. 9-10, 19-22, 24-26. The selection of valuation methodologies for any particular property requires an appraiser to exercise professional judgment based on factors like the characteristics of the property being valued and the available data. See Petr. Br. 11-12 (citing appraisal treatises); U.S. Br. 19-21; AAR Br. 18-19. The idea that the number produced by one preselected methodology will equal "value" is entirely foreign to the discipline of property appraisal, which recognizes that

value is not the product of formulas and instead is a matter of expert opinion and judgment.

Respondents sidestep these principles, but do not (and cannot) question them. Nor do they question that Congress was well aware of how property appraisals are conducted, and enacted section 11501 against this background understanding. See Petr. Br. 26. As *amicus curiae* the Association of American Railroads ("AAR") notes, the cases cited in the legislative history of section 11501 reveal that Congress recognized that an assessment of the parties' competing valuation methodologies was a necessary step in determining market value. See AAR Br. 23 n.17.

Because property appraisers normally utilize several different methodologies, each of which produces "evidence of value" that may be considered in an expert's formulation of an opinion of value, the claims of respondents and the Eleventh Circuit that the state appraiser's choice of particular valuation techniques are matters of sovereign state "policy" are contrived. Whether a stock-and-debt approach or an income approach (and if the latter, whether a discounted cash flow or a yield capitalization technique) yields better evidence of CSXT's unit value are questions of fact to be decided based on CSXT-specific data and professional judgment, not matters of state policy. *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 741-42 (1997) (even in the absence of a functioning market, the market value of property is "simply an issue of fact about possible market prices," and in such cases, the courts typically determine value and valuation methods on the basis of "'opinion evidence'").

Respondents gain no ground by pointing out that "the true market value of rail transportation property" cannot be exactly determined (since there is no functioning market for sales of such property). Resp. Br. 19. That does not make this element of a (b)(1) claim a "'fiction,'" as respondents maintain. *Id.* Even if not empirically observable, the true market value of a property is still a question of fact commit-

ted to the judgment of the district court, as are many kinds of facts that require estimation, economic or scientific modeling, and expert testimony. In many contexts, courts routinely treat not only the ultimate question of market value but also the selection of a valuation methodology as a question of fact to be determined by the factfinder. See Petr. Br. 27-30 (detailing other contexts where choice of valuation methodology is treated as a factual question). No party (even a state party) is entitled to deference on what evidence a district court may rely upon in finding a fact necessary to adjudicate a (b)(1) claim.

Indeed, the district court itself recognized that in "a more typical case" it would consider both sides' expert evidence regarding appropriate methodologies, approaches, and techniques to determine true market value. JA 207 n.8.[2] There is no reason for (b)(1) cases to be treated as atypical cases in which one side's factual assertions about appropriate valuation methods are entitled to an irrebuttable presumption of correctness.

5. Finally, aside from its irreconcilability with the plain language and purpose of the statute, the rule of deference that respondents advocate is indeterminate. *Supra*, at 7-8; Petr. Br. 40. As the Solicitor General points out, "[i]n most instances, there will be no single state 'methodology' to which the court could defer." U.S. Br. 19. That is because, as noted above, state appraisers, following professional practice, will generally use multiple methods to generate evidence of value and then derive a point estimate of value. That final valuation may differ from any of the calculated values. Appraisal Inst., *supra*, at 600. That is what Georgia's appraiser did here; he

---

[2] Thus, contrary to respondents' assertions that the district court carefully analyzed and considered the competing expert testimony at trial, *see* Resp. Br. 6 n.6, 34 n.16, the district court clearly explained that it could not and did not consider the unquestionably well-qualified opinion of value—the ultimate issue in the case—offered by CSXT's appraisal expert. JA 207 n.8.

used three different valuation methods to calculate value, and then chose a value that (while close to the value calculated under a yield capitalization approach) corresponded to none of the calculated values. Petr. Br. 14-15. State appraisers do not arrive at a market value of rail transportation property by "correctly applying" a single preselected methodology, and Congress did not impose such a counterproductive rule on district courts. Respondents' rule of deference to a state appraiser's "choice" of a particular analytical technique thus has no foundation in the statute or in valuation practice.

This Court should adhere to the plain meaning of subsection (b)(1). As this Court has declared, the "reach" of subsection (b)(1) and its companion provisions is "straightforward": "Congress prohibited discriminatory tax rates and assessment ratios *in no uncertain terms*, and set forth *precise standards for judicial scrutiny of challenged rate and assessment practices*." *ACF*, 510 U.S. at 337, 343 (internal citation omitted) (emphasis added). The "precise standard" of subsection (b)(1) requires a comparison of the assessed-to-true market value ratios of railroad transportation and other commercial and industrial property, and "[i]t is clear from this language that in order to compare the actual assessment ratios, it is necessary [for a district court] to determine what the 'true market values' are." *Okla. Tax*, 481 U.S. at 461. The statute vests the district court with the power to determine the fact question of "true market value" of property without qualification. Nothing in the statute limits the district court to applying state methodologies or restricts the evidence of market value the district court may consider in resolving that question of fact. This Court should not write into the statute the exclusionary rule respondents favor.

6. Surrounding provisions of the statute reaffirm the plain meaning of § 11501(b)(1). Petr. Br. 33-34. *First*, subsection (c) states that "[t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11501(c). This provision demonstrates that Con-

gress intended an evidentiary hearing on true market value, and that it knew how to impose procedural restrictions when that was its intent. Petr. Br. 33-34; U.S. Br. 13-14; AAR Br. 24. Noticeably *absent* from this provision is *any* restriction on what valuation evidence courts may consider in determining "true market value."

Second, subsection (c)'s provisions regarding proof of the market values of other commercial and industrial property in the assessment jurisdiction at issue underscore that the district court independently determines the true market value of all property, including rail transportation property, regardless of what methods the state appraiser employs. This provision requires that a specific statistical sampling method (the "sales assessment ratio study") be used in determining the ratio of assessed to true market value for the other commercial and industrial property in the relevant assessment jurisdiction. Petr. Br. 34-35. The ratio must be proved "*to the satisfaction of the district court*," and if this cannot be done, alternative methods are provided. 49 U.S.C. § 11501(c) (emphasis added).

Respondents draw the wrong conclusion from subsection (c). They focus on the nature of the presumptive statutory method for valuing commercial and industrial property, and make the illogical leap of reasoning that because railroad value cannot be likewise estimated from actual sales data, Congress must have intended deference to the State defendants' choice of valuation techniques. The more natural inference is that since Congress did not require district courts to defer to any state method for valuing commercial and industrial property, it likewise did not require courts to defer to any state methods for valuing rail transportation property. Moreover, respondents wholly ignore subsection (c)'s requirement that the ratio of assessed value to "true market value" of other commercial and industrial property must be proven "to the satisfaction of the district court." Because "identical words and phrases within the same statute should normally be given

the same meaning," *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007), Congress's use of the identical term—"true market value"—with respect to rail transportation property must likewise refer to the value of the property as determined by the court without deference to the State's preferred method. See Petr. Br. 33-35; U.S. Br. 14-16.

7. Respondents' invocation of federalism principles is unavailing. Respondents devote little space to the policy of the 4-R Act but much to the Tax Injunction Act, 28 U.S.C. § 1341, and decisions refusing to construe federal statutes, such as 42 U.S.C. § 1983, as authorizing injunctive relief against state tax practices (*e.g.*, *Nat'l Private Truck Council, Inc.* v. *Okla. Tax Comm'n*, 515 U.S. 582 (1995)). But as respondents concede, Resp. Br. 10, in the 4-R Act Congress "declared an exception from the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, allowing railroads to challenge discriminatory taxation in federal district courts." *Okla. Tax*, 481 U.S. at 457-58; 49 U.S.C. § 11501(c) ("Notwithstanding section 1341 of title 28 . . . , a district court of the United States has jurisdiction . . . to prevent a violation of subsection (b) of this section."). The presumption against interference with state tax collection is thus overcome; Congress found the creation of such a federal remedy to be necessary given the enduring practices of discrimination. The only issue is whether, having defined "precise standards for judicial scrutiny of challenged rate and assessment practices," *ACF*, 510 U.S. at 343, Congress intended to restrict the evidence that the district court could consider in adjudicating the fact question of "the true market value of rail transportation property." For all the reasons given above, the answer is plainly no.

Respondents fare no better in invoking the *Gregory* clear statement canon. As noted above, that canon applies only when the statutory provision is "susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers." *Salinas*, 522 U.S. at 59-60. Respondents' construction is not a "plausible interpreta-

tion" of subsection (b)(1), and allowing a district court to consider expert testimony on market value using different valuation techniques than the State's appraiser employed would not alter the federal-state balance. See Petr. Br. 41-42.

Indeed, respondents themselves do not take seriously the clear statement canon they urge upon the Court. Their eleventh-hour interpretation that a court may determine whether the State's valuation method is "reasonable" has no textual support whatsoever, for nowhere does the 4-R Act expressly allow the federal court to evaluate the reasonableness of the State's chosen methodology. While respondents' interpretation is incorrect and unworkable, the fact that respondents proposed it fatally undermines their contention that *Gregory* has any application here.

Finally, respondents rely on *ACF*, Resp. Br. 12-13, but never address CSXT's showing that (1) in *ACF*, unlike this case, this Court found that the taxpayers' construction of the subsection at issue (subsection (b)(4)) was contrary to its plain meaning, when interpreted in light of surrounding provisions; (2) the federalism canon invoked was the rule (inapposite here) against inferring preemption beyond the "evident scope" of a narrow provision, 510 U.S. at 345; and (3) the position advocated by the taxpayers there actually encroached upon state sovereignty, jeopardizing a State's critical legislative power to grant exemptions from state *ad valorem* taxation. See Petr. Br. 45-47; see also U.S. Br. 29-30; AAR Br. 19 n.12. *ACF* provides respondents no support in this case.

8. Like their appeal to federalism canons, respondents' comity-based arguments have no force. In *Oklahoma Tax*, this Court summarily dismissed similar arguments based on "principles of comity" that relied on the supposed burden of federal court valuation proceedings and the interference with state tax collection efforts. This Court declared that "[t]hese are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors.

It should go without saying that we are not free to reconsider them now." 481 U.S. at 464.

In any event, respondents' policy arguments are overstated. Respondents complain that CSXT's interpretation "would turn the district courts into federal boards of equalization required to oversee protracted, complicated battles between expert witnesses over whose method is 'best.'" Resp. Br. 23. But contested valuations of property are commonplace in the federal courts. Petr. Br. 27-30. Moreover, although valuation cases since *Oklahoma Tax* have been too infrequent to pose any threat of undue burden on the federal courts, see AAR Br. 13 & n.9, respondents concede that after *Oklahoma Tax* extensive trials will be conducted (at a minimum) on the application of valuation methodologies. Resp. Br. 7, 33-34. Allowing the district court to hear a case under subsection (b)(1) as "a more typical [valuation] case," JA 207 n.8, and to consider expert testimony on which valuation techniques provide the best evidence of true market value, do not appreciably affect the complexity or burden of 4-R Act proceedings.[3]

In addition, the marginal effect on state tax administration practices is minimal. Respondents do not dispute that 4-R Act injunctions only prevent the collection of excessive tax in the year in question; courts do not enjoin States from using any valuation methods. U.S. Br. 10, 17; AAR Br. 21; Petr. Br. 49-50. Respondents nonetheless claim that States "will have no real choice but to change [their] assessment practices" if their interpretation is not adopted. Resp. Br. 32. That argument is unsound for a number of reasons. First, it is predicated on the incorrect supposition that state appraisers typically use one appraisal method to determine true market value, which must be changed if the railroad prevails in a

[3] As Congress heard in hearings before enacting section 11501, techniques to value railroads were "neither incomprehensible nor overly complicated," and in fact had reached "a substantial degree of refinement." *Tax Assessments on Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 88th Cong. 18 (1964).

(b)(1) challenge. See Petr. Br. 8-12. Indeed, this case proves that States do not use just one appraisal method—either year-to-year or even in the same year. Petr. Br. 14, 44-45; U.S. Br. 21-22; AAR Br. 19 & n.13.

Second, even if a court decides to put substantial weight on a particular method in determining market value in a given year, that is no reason to assume that courts will do the same in following years; a court adjudicating a subsection (b)(1) claim for a specific tax year simply makes a determination, based on the available data, that such a method yielded the best evidence of the true market value of a railroad's transportation property in that year.

Third, both the underlying railroad data and the data for other commercial and industrial property shift every year, so a valuation technique that results in injunctive relief in one tax year may not in the next, if the railroad ratio in the next year is no longer 5% higher than the ratio for other commercial and industrial property. See 49 U.S.C. § 11501(c).

Fourth, to the extent States are choosing valuation methods that discriminate against railroads systematically, thus flouting the Act's terms, there is nothing to lament if as a practical matter the States are forced to abandon such practices. See S. Rep. No. 87-445, at 448 (state tax discrimination against railroads "results" in large measure from "outmoded assessing procedures" employed at the state level); *id.* at 451 ("outdated procedures" for assessing property "are sometimes deliberately retained").

Finally, respondents' position trivializes federalism. Federalism is about respect for and noninterference with matters important to state sovereignty, such as final criminal judgments, ongoing state judicial and administrative proceedings, and state administration of prisons and schools. It would be beyond odd to include in that company the selection of valuation methodologies, particularly when States delegate the power to select methodologies to state appraisers who can and do change the methods from year to year. See *supra*, at 7-8,

14-15; Petr. Br. 14-15, 37 & n.12. The fact that not a single state Attorney General filed an *amicus* brief in support of respondents attests to the absolute absence of a core federalism interest in this case.

9. When Congress has spoken plainly to the matter at hand, as it has done with § 11501(b)(1), the Court's inquiry comes to an end and resort to legislative history is unnecessary. *Okla. Tax*, 481 U.S. at 461 (rejecting similar arguments of the state respondents from legislative history). However, should this Court choose to consider the 4-R Act's legislative history, that history supports the plain text.

Respondents attempt to turn to their advantage certain statements of witnesses representing various railroads or the AAR in congressional hearings that purportedly expressed lack of concern about railroad valuation methods used by the States. Resp. Br. 29-31. As an initial matter, comments of individuals at committee hearings are entitled to *no* weight because this Court "decline[s] to accord any significance to . . . statements" that were *not* "made by a Member of a Congress, nor . . . included in the official Senate and House Reports." *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986); see also *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) ("statements . . . made to committees of Congress . . . are without weight in the interpretation of a statute"); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 48:10 (7th ed. 2007). Respondents' contention that a court should give weight to the views of private witnesses representing industry—"because the railroad *industry* was in effect the primary sponsor of the legislation," Resp. Br. 31 (emphasis added)—is unknown to this Court's precedents. Such a novel canon should be summarily rejected, as it would allow courts to stray from *Congress's* plainly expressed intent.

Moreover, clutching at isolated statements of hearing witnesses betrays the weakness of respondents' analysis of the legislative history. Regardless of the importance that these

particular industry witnesses attached to state valuations,[4] it is uncontroverted that Congress's vexation with the States' use of unfair and discriminatory valuation practices was one of the driving forces behind the Act. Respondents even *concede* that Congress acted out of "real concern" regarding the States' discriminatory use of "'outmoded' or 'outdated' procedures" in valuing railroad properties. Resp. Br. 35 (quoting S. Rep. No. 87-445, at 448); see Petr. Br. 36 (same). Respondents attempt to cover this flank by claiming that Congress intended district courts to distinguish binding state methods from unreasonable state methods, Resp. Br. 35, even though

---

[4] Respondents overread the witness statements upon which they rely. James Ogden testified on behalf of the AAR that the "principal problem" was discriminatory assessment rules for different kinds of property rather than the inadequacy of railroad valuation methods. *Tax Assessments on Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 88th Cong. at 18-19. While that was a major problem corrected by the 4-R Act, *see* Petr. Br. 45, nothing in Ogden's statement suggests that discrimination caused by the State's choice of improper valuation methods was not also a problem, or that district courts were not free to reject such methods in resolving the fact question of the true market value of rail transportation property. Similarly, Philip Lanier's reference to "the valuation question" not being "our problem," *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 91st Cong. 39 (1969) ("*Hearing on S. 2289*") (statement of Philip M. Lanier, Vice President, Louisville & Nashville Railroad), meant only that he did not intend for Congress to dictate to the States which methods they should use. *See Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 138 (1970) (statement of Philip M. Lanier, Vice President, Louisville & Nashville Railroad) (the legislation "would not deal with valuation being standard"). Indeed, Lanier was a proponent of an independent judicial determination of true market value. *See Hearing on S. 2289*, 91st Cong. at 40 (statement of Philip M. Lanier, Vice President, Louisville & Nashville Railroad) ("a multifactor formula is better for railroads because at best it is a matter of judgment as to the value, and there are several good indicators of value").

Congress said nothing of the sort in the statute or otherwise. And it is not surprising that Congress was silent, since respondents' rule is judicially unadministrable—requiring courts to enter the unknown thicket of distinguishing valuation methods that are not "reasonable" from those that, while reasonable in some undefined sense, are not the most appropriate methods under the circumstances. Thus, the far simpler solution is to give subsection (b)(1) its plain meaning, and permit district courts applying the (b)(1) discrimination test to make a fully independent determination of market value without having to adhere slavishly to the valuation methods endorsed by the State's appraiser.[5]

10. Respondents devote the final section of their brief to arguing an issue not presented: whether subsection (b)(1) would permit a district court to value rail transportation property according to the unit-value method when state law requires the inventory method. Respondents attempt this shift in focus because a state choice of a unit-value versus an inventory method arguably implicates state policy—unlike a state appraiser's choice between different income techniques for estimating the unit value of a particular railroad, which is the question presented here. If this Court wishes to reach that question, the answer is that there is no state policy exception to the 4-R Act.

Subsection (b)(1) defines a precise federal formula for determining discrimination based on comparing the ratios of assessed-to-market value of rail transportation property and other commercial and industrial property. Unit valuation is

---

[5] Respondents also claim that their rule of deference captures the "latitude" that purportedly this Court gave States in resolving constitutional challenges to railroad valuations prior to passage of the 4-R Act. Resp. Br. 36-40; *see also Amicus Curiae* Multistate Tax Commission ("MTC") Br. 10-12 (citing cases involving constitutional challenges). This argument lacks force. The fact that this Court gave States "latitude" to overvalue rail transportation property in deciding *constitutional* challenges is irrelevant to the standards that Congress intended be set in a § 11501(b)(1) proceeding.

universally regarded as the most reasonable means of valuing rail transportation property. Petr. Br. 8. If an outlier State like Virginia were to assess rail transportation property at a higher ratio to its true market value than other commercial and industrial property by employing an inventory method to value rail transportation property, subsection (b)(1) provides the railroad a remedy. Congress's concern was remedying discrimination. In deciding whether the State defendants have discriminated, the district court makes an independent determination of the fact of "true market value." Where a federal violation is proven, the railroad is entitled to relief no matter what valuation methods States employ. Indeed, the courts have found 4-R Act violations when practices were sanctioned by state statutes and even state constitutions. Petr. Br. 39, 45.[6] The Supremacy Clause requires no less.

* * * *

Redressing decades of state and local tax discrimination, Congress provided railroads a federal court remedy "in no uncertain terms," *ACF*, 510 U.S. at 343, and vested district courts with the power to determine "the true market value of rail transportation property" in applying the statutory federal discrimination standard. Congress did not abridge or qualify that power in any dimension, and this Court should not craft an unfounded exclusionary rule that would shelter the very discrimination Congress intended to forbid.

---

[6] *Amicus curiae* MTC claims that a handful of States have codified a methodology policy choice in their statutes, *see* MTC Br. 8, but all of the statutes it cites require or permit consideration of multiple methodologies, as well as leave discretion to the state appraisers to decide what weight to give the various methodologies in determining true market value. Ala. Code § 40-21-6; Ark. Code Ann. § 26-26-1607; Colo. Rev. Stat. § 39-4-102; Fla. Stat. § 193.011. Regardless, even if any State were in the future to legislate a single valuation methodology for an appraiser to apply, that would not overcome the plain meaning of the 4-R Act.

CONCLUSION

For the foregoing reasons and those stated in CSX's opening brief, the judgment should be reversed and the case remanded for a new trial.[7]

Respectfully submitted,

ELLEN M. FITZSIMMONS
DAVID J. BOWLING
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 359-3200

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ILEANA M. CIOBANU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Ave., NW
Washington, DC 20004
(202) 783-8124

JAMES W. MCBRIDE
BAKER, DONELSON,
BEARMAN, CALDWELL
& BERKOWITZ, PC
555 Eleventh Street, NW
6th Floor
Washington, DC 20004
(202) 508-3400

Counsel for Petitioner

October 22, 2007

* Counsel of Record

---

[7] Respondents wrongly claim that on remand CSXT is not entitled to a new trial. *See* Resp. Br. 43. Because the district court's determination that it was barred from considering CSXT's evidence is the functional equivalent of excluding evidence, JA 214-16, and because under the court of appeals' ruling, "[t]he district court was not allowed to consider a valuation methodology different from the methodology of the Board," Pet. App. 15a, on remand the district court must consider the proper weight to give CSXT's expert evidence on true market value in a new trial.